

INTELLECTUAL PROPERTY LAW OFFICES

CARRIER, BLACKMAN & ASSOCIATES, P.C.24101 NOVI ROAD
SUITE 100
NOVI, MICHIGAN 48375Tel. (248) 344-4422 Fax (248) 344-1096
E-mail: cbalaw@ameritech.net
www.carrier-blackman.com

JOSEPH P. CARRIER*

WILLIAM D. BLACKMAN*

JEFFERY B. LESPERANCE

*Registered to practice
before the U.S. Patent and
Trademark Office

U. S. and Foreign Patents, Trademarks, Copyrights, Computer Law, Trade Secrets, Licensing, and Litigation

FACSIMILE TRANSMISSION COVER SHEETDATE: 01-05-04 OUR REF: ΣΟΔ·103·Α YOUR REF: 09/595,943TO (COMPANY): US Patent & Trademark OfficeATTN: US Patent Office Board of Appeals & InterferencesFROM: William D. BlackmanFAX NO. CALLED: 308-7952 NO. OF PAGES (Including this page) 83We are also mailing you a confirmation copy of this material if this box is checked.

If the received fax is illegible or incomplete, please call (248) 344-4422 for re-sending.

MESSAGE: following is our Appeal Brief in triplicateThank you.**RECEIVED**

JAN 07 2004

GROUP 3600**CONFIDENTIALITY NOTICE**

The information contained in this transmission is confidential. It is protected by the attorney-client, joint-defense, work-product, witness-statement and/or party-communication privileges. It is intended only for the use of the individual or entity named above. If the recipient or reader of this message is not the intended recipient named above, distribution, further transmittal, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone, and return the original message to us at the above address. Thank you.

Attorney Docket No. EOD-103-A

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Eastman
Serial Number: 09/595,943
U.S. Filing Date: 16 June 2000
Group Art Unit: 3637
Confirmation No.: 2911
Examiner: Wilkens, Janet M
Title: OUTDOOR ENCLOSURE WITH SCENT-DAMPENING LINER

JAN - 5 2004

U.S. PATENT
AND TRADEMARK
OFFICE
APPEALS &
INTERFERENCES
SERVICES

APPEAL BRIEF

RECEIVED
JAN 07 2004
GROUP 3600

1. Real Party in Interest

The real party in interest in this application is the licensee and manufacturer, Eastman Outdoors, Inc., a Michigan domestic corporation.

2. Related Appeals and Interferences

There are no related appeals or interferences pending which will directly affect, be directly affected by, or have a bearing on the Board's decision in the present appeal.

3. Status of Claims

Claims 1-5 and 17-23 are pending in the present application.

Claim 17 has been allowed.

Claims 1, 3-5, 7, 10-15 and 23 have been rejected under 35 USC 103(a) as unpatentable over Anderson, U.S. 6,253,777 in view of Vickers, U.S. 5,678,247 in the Final Office Action of September 5, 2003.

Claims 1-5, 7 and 23 have been rejected under 35 USC 103(a) as unpatentable over Smith, U.S. 3,709,237 in view of Anderson, U.S. 6,253,777 and Vickers, U.S. 5,678,247 in the Final Office Action of September 5, 2003.

Claims 9 and 18-22 have been rejected under 35 USC 103(a) as unpatentable over Smith, U.S. 3,709,237 in view of Anderson, U.S. 6,253,777 and Vickers, U.S. 5,678,247 in view of Tsai, U.S. 5,439,018, in the Final Office Action of September 5, 2003.

Claims 1, 3-5, 7, 8, and 18-23 have been rejected under 35 USC 103(a) as unpatentable over Tsai, U.S. 5,439,018 in view of Anderson, U.S. 6,253,777 and Vickers, U.S. 5,678,247 in the Final Office Action of September 5, 2003.

Claims 1, 3-7, 9-16 and 18-23 have been rejected under 35 USC 103(a) as unpatentable over Beavers, U.S. 3,810,482 in view of Anderson, U.S. 6,253,777 and Vickers, U.S. 5,678,247 in the Final Office Action of September 5, 2003.

Claim Numbering Issues

It should be noted that some of the claim numbers were changed by the Examiner after filing. The reason for some of the claims being re-numbered is that the Examiner received applicant's (faxed) Amendment B before receiving applicant's (mailed) Amendment A.

On page 2 of paper No. 6, the non-final Office Action dated March 13, 2003, the Examiner stated:

"Misnumbered claims 18-22 have been renumbered 20-22, 18 and 19.

(Please note: Amendment B was received by the Office before (has an earlier date) Amendment A; therefore, the newly proposed claims had to be renumbered as stated above.)

Applicant is in agreement with the Examiner's re-numbering of selected claims, and in the copy of the claims filed with Amendment C, applicant re-numbered the pending claims in compliance with the Examiner's claim numbering system. The Claims in the Appendix, at the end of this brief, are also numbered in compliance with the Examiner's claim numbering system.

4. Status of Amendments

Applicant filed amendment A (by mail) on December 5, 2001, and this amendment was entered into the file.

Applicant filed amendment B (via facsimile) on December 28, 2001, and this amendment was entered into the file.

Applicant filed amendment C on June 13, 2003, and this amendment was entered into the file for purposes of appeal, according to the Advisory Action of June 2, 2003.

5. Summary of Invention

Applicant's invention relates to a portable hunting blind or similar enclosure, to provide cover to a hunter or naturalist in the field. The enclosure according to the invention is provided with a scent-dampening liner, preferably on an inward-facing surface thereof.

An enclosure according to the present invention includes at least one wall, and a scent-dampening lining material disposed on a surface thereof. In a particular embodiment of the

invention, the lining material includes a binder, and has a multiplicity of carbon particles interspersed in the binder. The scent-dampening liner may be directly attached to an interior wall surface. Alternatively, the lining material may be affixed to a fabric surface, which is attached to the inner wall.

In a first embodiment of the invention, as shown in Figures 1 and 4, the enclosure includes a plurality of screen panel sections pivotally connected in a sequence, and is open at the top end thereof. In this embodiment, at least one of the panel sections has a scent-dampening liner.

In another embodiment of the invention, as shown in Figures 5, 6 and 8, a tent-like enclosure is formed of flexible fabric, and includes multiple walls, a roof section, and support poles or a similar support structure. This tent-like structure includes at least one panel having a scent-dampening liner.

In still another embodiment of the invention, as shown in Figure 9, a foldable enclosure includes a fabric shell, similar to that of the second embodiment, and further includes four foldably collapsible X-shaped subframe assemblies and one foldably collapsible U-shaped support structure.

In this modified embodiment, the roof panel is formed of a flexible material, and the roof panel and three of the wall panels are supported in the assembled configuration by the respective X-shaped subframe assemblies, the door comprises a zipper attached to one of the wall panels, and the wall panel having the door therein is supported by the U-shaped support structure.

Claim 16 is a dependent claim directed to this third embodiment.

Allowed Claim 17 is an independent claim, also directed to this third embodiment.

6. Issues on Appeal

- A. What is the standard for determining whether art is analogous?
- B. Is the Vickers reference analogous to applicant's field of endeavor?
- C. What is the standard for combining references to reject a claim under 35 U.S.C. 103?
- D. Are the Anderson and Vickers references properly combinable?
- E. What is taught by the combination of Anderson and Vickers?
- F. Are the Smith, Anderson and Vickers references properly combinable?
- G. What is taught by the combination of Smith, Anderson and Vickers?
- H. Are the Tsai, Anderson and Vickers references properly combinable?
- I. What is taught by the combination of Tsai, Anderson and Vickers?
- J. Are the Beavers, Anderson and Vickers references properly combinable?
- K. What is taught by the combination of Beavers, Anderson and Vickers?
- L. Does Applicant's claimed invention patentably distinguish over the teachings of the cited references?
- M. Is hindsight appropriate in evaluating claims?
- N. Is the Examiner's rejection of applicant's claims based on hindsight?
- O. Should the Patent Office Board of Appeals and Interferences reverse the Examiner's rejection of applicant's pending claims?
- P. What features of the claims justify separate grouping thereof?

7. Grouping of Claims

Applicant respectfully suggests that the appealed claims should not stand or fall together.

Applicant suggests the following grouping of the claims:

Group I: Claims 1-4 and 7.

Group II: Claims 8, 9, 10-12 and 14-15.

Group III: Claims 5, 13 and 19.

Group IV: Claim 16.

Group V: Claim 18.

Group VI: Claims 23 and 24.

8. Argument**A. Art is Only Analogous Where it is Reasonably Pertinent to the Problem with which the Inventor is Involved.**

The Federal Circuit has made it clear that decision-makers should not consider references that are "too remote to be treated as prior art." *In re Clay*, 966 F.2d 656, 658 (Fed. Cir. 1992) (quoting *Panduit Corp. v. Dennison Mfg.*, 810 F.2d 1561, 1568 n. 9 (Fed. Cir. 1987), cert. denied, 481 U.S. 1052, 107 S.Ct. 2187, 95 L.Ed.2d 843 (1987)).

The determination of whether a prior art reference is within the inventor's field or an analogous art is a factual issue. *In re Clay*, 966 F.2d 656, 658 (Fed. Cir. 1992).

Courts consider two factors in determining whether prior art is analogous: "(1) whether the art is from the same field of endeavor, regardless of the problem addressed, and (2) if the reference is not within the field of the inventor's endeavor, whether the reference still is reasonably pertinent to the particular problem with which the inventor is involved." *In re Clay*, 966 F.2d at 658-59; *In re Wood*, 599 F.2d 1032, 1036, 202 U.S.P.Q. 171, 174 (CCPA 1979). See also *In re GPAC Inc.*, 57 F.3d 1573, 1577-1579 (Fed. Cir. 1995).

It will therefore be seen that, if a reference is not reasonably pertinent to the particular problem being solved by an inventor, then that reference cannot be considered to be analogous to the field in which the inventor is working.

B. The Vickers Reference is Not Analogous to Applicant's Claimed Invention.
Because the Vickers Reference is Not Within Applicant's Field of Endeavor, and is also Not Reasonably Pertinent to the Problem with which the Inventor is Involved.

'Applicant's Field of the Invention' section states: "The present invention relates to portable shelters and similar outdoor enclosures, for providing a hidden location for a hunter or naturalist to occupy in the field, while observing or waiting for game or other wildlife."

Applicant incorporates several novel features into the inventive outdoor enclosures. However, every embodiment and feature of applicant's invention is directed to **improvements in the art of outdoor enclosures.**

In contrast, the Vickers reference is directed to an **article of clothing** including a three-layered sandwich of flexible fabric materials, in which a central layer is made of an odor-absorbing material. The 'Field of the Invention' section of Vickers states "The present invention relates generally to odor absorbing articles of clothing...." (emphasis added). Every section of the Vickers reference mentions clothing articles, including the title of the patent. Clearly and uncontroversibly, the Vickers reference is focused on improvements in wearable clothing articles.

The odor-absorbing clothing of Vickers is not concerned with, nor related to improvements in outdoor enclosures. Further, it will be noted that while Anderson is classified in class 135, subclass 115, Vickers is classified in class 2, subclass 69.

Further, there is a discussion at some length in Vickers from column 3, line 66 through most of column 4 about the importance of using soft materials for the fabrics in the different

layers, to promote quiet movement of the wearer.

Clearly, applicant's invention and the Vickers reference are drawn from very different fields of endeavor.

The question therefore becomes whether or not the Vickers reference is reasonably pertinent to the problem being solved by the present invention.

The problem being solved by applicant's invention is that currently available hunting blinds and related outdoor enclosures are not as scent-supressing as they could be.

Vickers' clothing article is not relevant nor reasonably pertinent to improvements in outdoor enclosures.

In Column 1, lines 38-41, Vickers gives examples of articles of clothing, including coats, vests, pants, and overalls. Clothing articles are mentioned in Column 1, line 52, in column 2, lines 33-37, and in every section of the reference, including the claims and the title of the reference. Further, Vickers' emphasis on soft fabric materials has no bearing on applicant's outdoor enclosure, which remains essentially stationary during use, and is not intended to be worn as an article of clothing.

Therefore, applicant respectfully suggests that the Vickers clothing article is not reasonably pertinent to the problem being solved by the applicant, and is therefore non-analogous art when considered in relation to applicant's claimed invention.

C. References are properly combinable under 35 U.S.C. 103 only where there is some motivation, teaching or suggestion in the art that they be combined.

In the present application on appeal, in the Final Office Action of September 5, 2003, the Examiner rejected applicant's claims based on four separate combinations of selected references. Therefore, the standard of when it is proper to combine references bears consideration here.

The Court of Appeals for the Federal Circuit commented on the standard for combining references in the case of *In Re Dembicza*k, 50 U.S.P.Q.2d 1614, 1617 (CAFC 1999), wherein the Court stated:

Our analysis begins in the text of section 103 quoted above, with the phrase "at the time the invention was made." For it is this phrase that guards against entry into the "tempting but forbidden zone of hindsight," (citations omitted), when analyzing the patentability of claims pursuant to that section. Measuring a claimed invention against the standard established by section 103 requires the oft-difficult but critical step of casting the mind back to the time of invention, to consider the thinking of one of ordinary skill in the art, guided only by the prior art references and the then-accepted wisdom in the field (citations omitted). Close adherence to this methodology is especially important in the case of less technologically complex inventions, where the very ease with which the invention can be understood may prompt one "to fall victim to the insidious effect of a hindsight syndrome wherein that which only the inventor taught is used against its teacher." Our case law makes clear that the best defense against the subtle but powerful attraction of a hindsight-based obviousness analysis is rigorous application of the requirement for a showing of the teaching or motivation to combine prior art references (citations omitted). Combining prior art references without evidence of such a suggestion, teaching, or motivation simply takes the inventor's disclosure as a blueprint for piecing together the prior art to defeat patentability—the essence of hindsight.

It is therefore evident that, in order to properly combine references and reject a claim as obvious based on that combination, firstly, there must be some suggestion, motivation, or teaching to combine the references, rather than mere conclusory statements by the Examiner, and secondly, it is improper to use the claims as a frame, and selected portions of the prior art references as puzzle pieces, to piece together a mosaic of the claimed invention, using hindsight gained from an applicant's disclosure. *Uniroyal v. Rudkin-Wiley*, 837 F.2d 1044 (CAFC1988).

Further guidance on combining references can be found in *In re Gorman*, 933 F. 2d 982, 986, 18 USPQ2d 1885, 1888 (CAFC 1991), which tells us that in determining whether prior art references make a claimed invention obvious, the decision maker may not simply engage in hindsight reconstruction of the claimed invention, using the applicant's structure as a template and selecting elements from references to fill gaps, instead, the references themselves must

provide some teaching whereby the invention would have been obvious.

As discussed in *Interconnect Planning Corp. v. Feil*, 774 F.2d 1132, 1143, 227 USPQ 543, 551 (Fed. Cir. 1985), it is the prior art itself, and not the applicant's achievement, that must establish the obviousness of the combination.

In the case of *In re Kotzab*, 55 USPQ 2d 1313, the Court of Appeals for the Federal Circuit stated:

A critical step in analyzing the patentability of claims pursuant to section 103(a) is casting the mind back to the time of invention, to consider the thinking of one of ordinary skill in the art, guided only by the prior art references and the then accepted wisdom in the field. See *Dembiczak*, 175 F.3d at 999, 50 USPQ2d at 1617. Close adherence to this methodology is especially important in cases where the very ease with which the invention can be understood may prompt one "to fall victim to the insidious effect of a hindsight syndrome wherein that which only the invention taught is used against its teacher." *Id.* (quoting *W.L. Gore & Assocs., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1553, 220 USPQ 303, 313 (Fed. Cir. 1983)).

Most if not all inventions arise from a combination of old elements. See *In re Rouffet*, 149 F.3d 1350, 1357, 47 USPQ2d 1453, 1457 (Fed. Cir. 1998). Thus, every element of a claimed invention may often be found in the prior art. See *id.* However, identification in the prior art of each individual part claimed is insufficient to defeat patentability of the whole claimed invention. See *id.* Rather, to establish obviousness based on a combination of the elements disclosed in the prior art, there must be some motivation, suggestion or teaching of the desirability of making the specific combination that was made by the applicant. See *In re Dance*, 160 F.3d 1339, 1343, 48 USPQ2d 1635, 1637 (Fed. Cir. 1998); *In re Gordon*, 733 F.2d 900, 902, 221 USPQ 1125, 1127 (Fed. Cir. 1984).

The above-quoted language of the Court of Appeals for the Federal Circuit clearly establishes that references are properly combinable, under 35 U.S.C. 103, only when there is some motivation, teaching, or suggestion that they be combined.

It is also well-established in the case law that a reference must be considered in its

entirety, and cannot be dissected to select only part of its teaching and disregard the rest. *Gore v. Garlock*, 220 U.S.P.Q. 303 (CAFC 1983).

The Examiner has cited the case of *In re Oetiker*, 977 F.2d 1443, 24 USPQ 2d 1443, to support the proposition that in her view, Vickers is analogous art which is allegedly combinable with hunting blinds.

Applicant accepts the case of *In re Oetiker* as binding precedent which is relevant to the present factual situation.

However, the *Oetiker* case also states, in 24 USPQ 2d at 1446, that

We have reminded ourselves and the PTO that it is necessary to consider "the reality of the circumstances" (citation omitted)—in other words, common sense—in deciding in which fields a person of ordinary skill would reasonably be expected to look for a solution to the problem facing the inventor. It has not been shown that a person of ordinary skill, seeking to solve a problem of fastening a hose clamp, would reasonably be expected or motivated to look to fasteners for garments. The combination of elements from non-analogous sources, in a manner that reconstructs the applicant's invention only with the benefit of hindsight, is insufficient to present a *prima facie* case of obviousness. There must be some reason, suggestion, or motivation found in the prior art, whereby a person of ordinary skill in the field of the invention would make the combination. That knowledge cannot come from the applicant's invention itself (emphasis added).

In the *Oetiker* case, the Court of Appeals reversed the Board of Appeals' finding of obviousness of a hose clamp invention, stating that the references on which the Board relied were improperly combined.

The Examiner has also cited the case of *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209, to support the proposition that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning, and so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a

reconstruction is proper (emphasis added).

While applicant recognizes the *McLaughlin* case, applicant strongly disagrees with the Examiner's application of the *McLaughlin* standard to the present facts.

Applicant respectfully traverses the Examiner's tacit assertion that the rejection of applicant's claims does not include knowledge gleaned solely from applicant's disclosure.

Applicant respectfully points out that the Examiner's rejection **includes knowledge gleaned only from applicant's disclosure**, specifically the idea of installing a scent-suppressing liner in an outdoor enclosure, which is not an article of clothing. Applicant respectfully submits that the only place the Examiner found the suggestion to place a scent-suppressing liner in an outdoor enclosure was in applicant's disclosure.

Since the Examiner has improperly included knowledge gleaned only from applicant's disclosure, as a result, *McLaughlin* fails to support the Examiner's position, but instead, supports applicant's position.

D. The Anderson and Vickers References are Not Properly Combinable Because they are Drawn from Non-Analogous Arts, and also Because the Examiner has not shown any Motivation, Teaching or Suggestion to Combine them.

The Anderson and Vickers references are not properly combinable. Vickers, by its own terms and title, is only concerned with odor-absorbing clothing articles. Anderson, by its own terms and title, is only concerned with flame-resistant tents.

The motivation to substitute Vickers' odor-absorbent layer for the flame-resistant tent liner of Anderson comes strictly and exclusively from the Examiner, and applicant respectfully suggests that the Examiner is basing the combination on knowledge gleaned solely from applicant's disclosure. Moreover, changing the flame-resistant lining of Anderson's tent to a different lining, which is not flame-resistant, is completely contrary to the teaching of the

reference, and would destroy the important fire-resistant character of the tent. References must be considered as a whole, as noted above. *Gore v. Garlock*, 721 F.2d 1540, 1553, 220 USPQ 303, 313 (Fed. Cir. 1983)).

The Examiner argues on page 3 of the Final Office Action that any material can be substituted for any other material. Applicant notes that the Examiner has not cited any authority for this proposition. Applicant requests some authority for this broad unsupported assertion. Applicant respectfully disagrees with, and traverses the Examiner's contention that all materials are equivalent, and any material can be substituted for any other material. Further, substituting a composite odor-absorbing liner for a flame-resistant liner made of polyester fibers is not a simple replacement of one material for another.

Accordingly, in a manner similar to the reasoning of the court in *Oetiker*, supra, it has not been shown by the Examiner that a person of ordinary skill, seeking to solve a problem of improving hunting blinds and other outdoor enclosures, would reasonably be expected or motivated to look to garments. Applicant maintains that the Examiner's combination of elements from non-analogous sources, in a manner that reconstructs the applicant's invention only with the benefit of hindsight, is improper, and should be reversed by the Board.

E. If Combined, the Anderson and Vickers References Fail to Teach Applicant's Claimed Invention.

Even assuming for the sake of argument that these references are combinable, the combined teachings of the Anderson and Vickers references would not produce applicant's claimed invention. The combination might teach a tent with a flame-resistant liner having an article of clothing inside the tent. Alternatively, the combination might teach the odor-absorbing clothing article of Vickers with a flame-resistant liner therein. The combination would never product applicant's claimed invention unless a hindsight-based reconstruction is used.

Therefore, applicant respectfully requests reconsideration and withdrawal of the rejection of claims 1, 3-5, 7, 10-15 and 23 based on the combination of Anderson and Vickers.

F. The Smith, Anderson and Vickers references are Not Properly Combinable because they are Drawn from Non-Analogous Arts, and also Because the Examiner has not shown any Motivation, Teaching or Suggestion to Combine them.

Smith teaches a foldable sportsman's blind with an open top. An important feature of the Smith enclosure is that it includes means for immobilizing hinging movement of the different foldable sections (Column 2, lines 13-18). The disclosed movement immobilizing means includes flaps at the bottom of the folding sections, and stakes for fixing the position of the flaps. Each foldable section of the Smith blind includes a rigid rectangular frame

Vickers, by its own terms and title, is only concerned with odor-absorbing clothing articles. Anderson, by its own terms and title, is only concerned with flame-resistant tents.

For reasons similar to that discussed in section D, above, applicant respectfully suggests that while the hunter's blind of Smith might properly be combinable with the flame-resistant tent of Anderson, neither Smith nor Anderson is properly combinable with the odor-absorbing clothing article of Vickers. The only suggestion to combine these references comes from the Examiner, after reading applicant's disclosure.

G. If combined, Smith, Anderson and Vickers fail to teach applicant's claimed invention.

If it is assumed for the sake of argument that the cited references are properly combinable, the combination of Smith, Anderson and Vickers would not teach applicant's claimed invention. Since the flame-resistant liner is central to the concept of Anderson, the combination might teach the foldable, open-top hunting blind of Smith, including the bottom flaps and stakes for immobilizing hinging movement, with the flame-resistant liner of Anderson, perhaps combined with the clothing article of Vickers in an outdoor hunting kit.

Applicant respectfully suggests that the only suggestion in the record to place a scent suppressing liner in a hunting blind or tent comes directly from applicant's own disclosure.

H. The Tsai, Anderson and Vickers references are not properly combinable because they are Drawn from Non-Analogous Arts, and also Because the Examiner has not shown any Motivation, Teaching or Suggestion to Combine them.

Tsai teaches a pyramid-shaped tent with a quick assembly/disassembly feature. As previously discussed, Anderson teaches a tent having a flame-resistant liner, and Vickers teaches an article of clothing having an odor-absorbing middle layer sandwiched between inner and outer fabric layers. Vickers, by its own terms and title, is only concerned with odor-absorbing clothing articles. Anderson, by its own terms and title, is only concerned with flame-resistant tents.

For reasons similar to that discussed in section D, above, applicant respectfully suggests that while the tent of Tsai might properly be combinable with the flame-resistant tent of Anderson, neither Smith nor Tsai is properly combinable with the odor-absorbing clothing article of Vickers. The only suggestion to combine these references comes from the Examiner, after reading applicant's disclosure.

I. If combined, Tsai, Anderson and Vickers fail to teach applicant's claimed invention.

As previously noted, the flame-resistant aspect of the Anderson reference is central to the teaching of that reference. Therefore, the combination of Tsai, Anderson and Vickers would produce a pyramid-shaped tent with a flame-resistant liner, perhaps combined with the clothing article of Vickers in an outdoor hunting kit. However, unless applicant's own teaching is used against applicant, the combination of Tsai, Anderson and Vickers would fail to produce applicant's claimed invention.

J. The Beavers, Anderson and Vickers references are not properly combinable because they are Drawn from Non-Analogous Arts, and also Because the Examiner has not shown any Motivation, Teaching or Suggestion to Combine them.

The Beavers reference teaches a box-shaped foldable outdoor tent including four X-shaped support members. The Examiner asserts that Beavers also teaches a foldable U-shaped support member, but applicant respectfully disputes this assertion of the Examiner. In column 3, line 57, it is stated that the struts of the subframes are releasably held in their extended position by a stretchable cord 24.

As previously discussed, Anderson teaches a tent having a flame-resistant liner, and Vickers teaches an article of clothing having an odor-absorbing middle layer sandwiched between inner and outer fabric layers. Vickers, by its own terms and title, is only concerned with odor-absorbing clothing articles. Anderson, by its own terms and title, is only concerned with flame-resistant tents.

For reasons similar to that discussed in section D, above, applicant respectfully suggests that while the box-shaped tent of Beavers might properly be combinable with the flame-resistant tent of Anderson, neither Beavers nor Anderson is properly combinable with the odor-absorbing clothing article of Vickers. The only suggestion to combine these references comes from the Examiner, after reading applicant's disclosure.

K. If combined, Beavers, Anderson and Vickers fail to teach applicant's claimed invention.

As previously noted, the flame-resistant aspect of the Anderson reference is central to the teaching of that reference. Therefore, the combination of Beavers, Anderson and Vickers would produce a box-shaped tent with a flame-resistant liner, perhaps combined with the clothing article of Vickers in an outdoor hunting kit. However, unless applicant's own teaching is used against applicant, the combination of Beavers, Anderson and Vickers would fail to produce applicant's claimed invention.

L. Applicant's pending Claims Patentably Distinguish over the references.

Each of the Examiner's remaining rejections make the leap of faith that it is purportedly proper to combine references from the garment art with hunting blinds or with tents. Applicant traverses this assumption as improper and based on hindsight. Further, Applicant submits that the Examiner has failed to establish a *prima facie* case of obviousness, and that each of the pending claims in the attached Appendix patentably distinguish over the references of record, considered individually or in any reasonable combination thereof.

M. Hindsight is never appropriate in evaluating claims.

As noted above in some of the citations to Federal Circuit cases, hindsight is strictly forbidden in evaluating the patentability of claims. Instead, the Examiner must place himself or herself in the shoes, so to speak, of a person having ordinary skill in the art, at the time the invention was made, and must evaluate applicant's invention in light of what was known at that time.

N. The Examiner's rejection of the pending claims is based on a hindsight analysis.

A careful review of the Examiner's position in the Final Office Action reveals that the Examiner is using the claims as a frame, and selected portions of the background references, taken out of context, as mosaic parts, in an effort to piece together and replicate applicant's claimed invention, using an improper hindsight analysis. In particular, the Examiner's rejection of applicant's claims 1, and 5-8, based on the combination of Waters and Brunn shows that the Examiner is basing his analysis using applicant's own disclosure as a starting point, and is then looking for selected pieces to "shoe-horn" into a rejection of the claim.

Applicant respectfully traverses the Examiner's position on all of the bases of rejection, and requests that the Board of Appeals and Interferences independently reconsider these

rejections.

O. The Patent Office Board of Appeals and Interferences should reverse the Examiner's rejection of applicant's pending claims.

Applicant respectfully submits that the claimed subject matter of applicant's invention patentably distinguishes over the teachings of the references, considered either singly or in any combination thereof.

For all of the foregoing reasons, applicant respectfully requests that the Patent Office Board of Appeals and Interferences reverse the Examiner's rejection of the pending claims.

P. The Claims Should Not Stand or Fall Together, Because of the Substantive Differences Between the Groups.

In the event that the Board agrees with any part of the Examiner's rejection, Applicant respectfully requests that the claims not stand or fall together, but instead, requests that the claims be considered in groups as requested above in Section 7 of this brief.

Proposed Group I includes claims 1-4 and 7. These claims require the wall to comprise a flexible fabric material, and also require the scent-suppressing liner to include a multiplicity of carbon particles and a binder. It is applicant's contention that each of these claims patentably distinguishes over all known prior art.

Proposed Group II includes claims 8, 9, 10-12 and 14-15. These claims also require the scent-suppressing liner to include a multiplicity of carbon particles and a binder. Each of these claims further requires the enclosure to be a tent including four wall panels and some kind of entryway. The tent concept should be considered separately and independently from the overall concept.

Proposed Group III includes Claims 5, 13 and 19. Each of these claims requires the liner

to be attached to a fabric material which is separate from, and which is attached to an inner surface of the wall. This total claimed structural combination has not been shown in the art, and merits separate consideration.

Proposed Group IV includes Claim 16. This claim includes most of the limitations of allowed claim 17, and therefore deserves independent consideration.

Proposed Group V includes Claim 18. Claim 18 is a broad, generic claim to an outdoor enclosure having a scent dampening liner on at least one wall thereof. Claim 18 does not require the scent-dampening material to include carbon. The other claims should be considered independently of claim 18, since they include more narrow limitations.

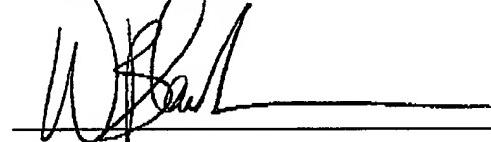
Proposed Group VI includes Claims 23 and 24. These claims require the lining material to be uncovered and open to air inside the enclosure. This promotes scent absorption and suppression. This total claimed structural combination has not been shown in the art, and merits separate consideration.

Conclusion

For the reasons outlined herein, applicant requests reconsideration and reversal of the Examiner's rejection of the pending claims.

The Commissioner is hereby authorized to charge any deficiency which may be required during the entire pendency of the application, and to credit any excess paid during the entire pendency of the application, to Deposit Account 50-0744 in the name of Carrier, Blackman & Associates, P.C. A duplicate copy of this sheet is enclosed.

Respectfully submitted,



CARRIER, BLACKMAN & ASSOCIATES, P.C.
24101 Novi Road, Suite 100
Novi, Michigan 48375-3248
January 5, 2004

William Blackman
Registration No. 32,397
(248) 344-4422

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that this correspondence is being transmitted via facsimile to the U.S. Patent Office Board of Appeals and Interferences at (703) 308-7952 on January 5, 2004.



9. Appendix

1 1. A portable enclosure for temporarily concealing a hunter or naturalist, said
2 enclosure comprising:
3 at least one wall comprising a flexible fabric material; and
4 a scent-dampening lining material disposed on a surface of said wall;
5 wherein said lining material comprises a binder and a multiplicity of carbon particles
6 interspersed in the binder.

1 2. The enclosure of Claim 1, wherein the enclosure comprises a plurality of panel sections
2 pivotally connected in a sequence.

1 3. The enclosure of Claim 1, wherein the binder comprises a polymer selected from the
2 group consisting of polyacrylates, polyurethanes, polyolefins, and mixtures thereof.

1 4. The enclosure of claim 1, wherein the lining material is attached to an inner surface of the
2 wall.

1 5. The enclosure of claim 1, wherein the lining material is attached to fabric material which
2 is separate from, and which is attached to an inner surface of the wall.

1 6. [canceled]

1 7. The enclosure of claim 1, wherein the carbon particle size ranges between 0.01 mm
2 and 5 mm in diameter.

1 8. The enclosure of claim 1, comprising four substantially triangular fabric wall panels sewn
2 together to form a pointed dome shape, wherein one of the wall panels comprises a zippered
3 entrance door therein.

1 9. The enclosure of claim 1, comprising four substantially rectangular fabric wall panels
2 sewn together to form a box shape, and a flexible roof panel, wherein one of the wall panels
3 comprises a zippered entrance door thereto.

1 10. A portable enclosure, comprising:
2 at least four interconnected wall sections;
3 door means for allowing a user entry into, and egress from said enclosure;
4 a roof attached to at least two of said wall sections; and
5 a lining material disposed on an interior surface of at least one of said wall sections or on
6 said roof;
7 wherein said lining material comprises a binder and a multiplicity of carbon particles
8 interspersed in the binder.

1 11. The enclosure of claim 10, wherein the binder comprises a polymer selected from the
2 group consisting of polyacrylates, polyurethanes, polyolefins, and mixtures thereof.

1 12. The enclosure of claim 10, wherein the lining material is directly attached to an inner

2 surface of the wall.

1 13. The enclosure of claim 10, where in the lining material is attached to a fabric material
2 which is attached to an inner surface of the wall.

1 14. The enclosure of claim 10, wherein said wall sections comprise a rigid material

1 15. The enclosure of claim 10, wherein the carbon particle size ranges between 0.01 mm and
2 5 mm in diameter.

1 16. The enclosure of claim 10, further comprising four foldably collapsible X-shaped
2 subframe assemblies and one foldably collapsible U-shaped support structure;
3 wherein the roof panel is formed of a flexible material, and wherein the roof panel and
4 three of the wall panels are supported in the assembled configuration by foldably collapsible X-
5 shaped subframe assemblies;
6 wherein the door means comprises a zipper attached to one of said wall panels;
7 and wherein the wall panel having the door means attached thereto is supported by said
8 U-shaped support structure.

1 17. A portable enclosure, comprising:

2 at least four interconnected wall sections;

3 door means for allowing a user entry into, and egress from said enclosure;

4 a roof attached to at least two of said wall sections; and

5 a lining material disposed on an interior surface of at least one of said wall
6 sections or on said roof;
7 four foldably collapsible X-shaped subframe assemblies and one foldably collapsible U-
8 shaped support structure;
9 wherein the roof panel is formed of a flexible material, and wherein the roof panel
10 and three of the wall panels are supported in the assembled configuration by foldably
11 collapsible X-shaped subframe assemblies;
12 wherein the door means comprises a zipper attached to one of said wall panels;
13 and wherein the wall panel having the door means attached thereto is supported
14 by said U-shaped support structure;
15 wherein said lining material comprises a binder and a multiplicity of carbon
16 particles interspersed in the binder;
17 and further wherein said foldably collapsible U-shaped support structure
18 comprises three pole members which are pivotally connected to one another.

1 18. A portable enclosure for temporarily concealing a hunter or naturalist, said
2 enclosure comprising:
3 at least one wall section comprising a flexible fabric material;
4 a closable entryway for allowing a user entry into, and egress from said enclosure;

5 and

6 a scent-dampening liner disposed on an interior surface of said at least one wall
7 section.

1 19. A portable enclosure for temporarily concealing a hunter or naturalist, said

2 enclosure comprising:

3 a plurality of interconnected wall sections;

4 a closable entryway for allowing a user entry into, and egress from said enclosure;

5 and

6 a composite scent-dampening sheet disposed on an interior surface of at least one
7 of said wall sections;

8 wherein said scent-dampening sheet comprises:

9 at least one sheet of flexible fabric material, and

10 a scent-dampening material operatively associated with said sheet of
11 flexible fabric.

1

1 20. A portable enclosure for temporarily concealing a hunter or naturalist, said
2 enclosure comprising:
3 a plurality of interconnected wall sections;

4 a closable door for allowing a user entry into, and egress from said enclosure; and
5 a scent-dampening liner disposed on an interior surface of at least one of said wall
6 sections;
7 wherein said liner comprises a multiplicity of carbon particles, and a flexible
8 binder for keeping said carbon particles together.

1 21. The enclosure of claim 18, wherein each of said interconnected wall
2 sections comprises a flexible fabric material.

1 22. A portable enclosure for temporarily concealing a hunter or naturalist, said
2 enclosure comprising:
3 a plurality of interconnected wall sections;
4 closable door means for allowing a user entry into, and egress from said
5 enclosure; and
6 a composite scent-dampening sheet disposed on an interior surface of at least one
7 of said wall sections;
8 wherein said scent-dampening sheet comprises:
9 at least one sheet of flexible fabric material, and
10 a liner, comprising a multiplicity of carbon particles and a flexible binder

11 for keeping said carbon particles in place on said fabric material.

1 23. The enclosure of claim 1, wherein the lining material is uncovered and open
2 to air inside the enclosure.

1 24 A portable enclosure for temporarily concealing a hunter or naturalist therein,
2 said enclosure comprising:

3 at least one wall defining an interior and an exterior of the enclosure on
4 opposite sides thereof;
5 a scent-dampening liner disposed on an interior surface of said wall, said
6 liner being substantially uncovered and open to air in the interior of said
7 enclosure.